

FILED
December 17, 2012

Court of Appeals
Division III
State of Washington

NO. 30555-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ELY HERNANDEZ GARCIA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. **The State presented insufficient evidence to convict Mr. Hernandez of drive-by shooting, because it failed to prove the alleged accomplice, who shot at an empty car, created a substantial risk of serious physical injury to a person.**

The State charged Mr. Hernandez with three counts of drive-by shooting, which requires proof that the defendant or his accomplice recklessly discharged a firearm in a manner creating a substantial risk of death or serious physical injury to another person. CP 51-52; RCW 9A.36.045(1). As explained in the opening brief, “substantial risk” means that “the forbidden result is likely to happen.” It has been described as a “strong possibility,” a “very real possibility,” or “an actual or practically certain risk.” A “speculative risk” or “potential risk” is not enough. Brief of Appellant at 9-10 (citing cases).

Here, the State’s evidence showed that one of Mr. Hernandez’s passengers fired one shot each at two empty, parked cars in retaliation for his own car having been damaged. The State’s evidence showed that instead of shooting straight, the shooter aimed at an angle away from a house in which the three alleged victims were sleeping, and toward the empty cars in the driveway. 3 RP 121, 159-162, 172-74. Thus, although the State may have proved potential risk to the persons in the house, it

presented insufficient evidence as a matter of law to prove substantial risk of death or serious injury to other persons. Brief of Appellant at 11-12.

The State and Mr. Hernandez do not disagree about what facts were presented at trial. Brief of Respondent at 1-2. The only dispute is whether these facts are sufficient as a matter of law to support the convictions. This is a question this Court reviews de novo. State v. Moncada, Slip Op. at 5 (No. 29913-9, filed 12/11/12).

The State begins its response by attacking multiple straw men. It catalogs the evidence it presented showing that Mr. Hernandez was driving the car, that he slowed down so his companion could shoot at the empty cars, and that he fled afterward. Brief of Respondent at 4-7. But Mr. Hernandez does not challenge the sufficiency of the evidence of identity or of knowledge that his companion was going to shoot at empty cars, or consciousness of guilt as to the malicious mischief. He challenges the sufficiency of the evidence on the element of substantial risk of serious bodily injury or death. Brief of Appellant at 9-12. The State's response at pages 4-7 is thus irrelevant.

Once the State addresses the issue, it urges a broad reading of the drive-by shooting statute, claiming that anytime a person fires a gun in a neighborhood he is guilty of this crime. Brief of Respondent at 8. There are two problems with this argument. First, the plain language of the

statute requires a “substantial” risk of “death or serious physical injury” to “another person”. The State would read this plain language out of the statute, which is improper because “we interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous.” State v. Ervin, 169 Wn. 2d 815, 823, 239 P.3d 354 (2010). Second, criminal statutes are not to be broadly construed, they are to be narrowly construed. State v. Pella, 25 Wn. App. 795, 797, 612 P.2d 8 (1980). “Furthermore, strict construction requires that the court resolve all doubts against including borderline conduct.” Id. Thus, the statute at issue here may not be interpreted to include shooting away from an alleged victim’s house and toward empty cars. The defendants should have been charged with malicious mischief, not drive-by shooting.

The State then cites two cases, but both support Mr. Hernandez’s position, not the State’s. See Brief of Respondent at 8-9 (citing State v. Perez, 137 Wn. App. 97, 151 P.3d 249 (2007); In re Bowman, 162 Wn.2d 325, 172 P.3d 681 (2007)). In Perez, the defendant was convicted of reckless endangerment “for firing a BB gun at a target held by a four-year-old child” and injuring him. Perez, 137 Wn. App. at 100. In Bowman, the defendants were convicted of felony murder based on the predicate felony of drive-by shooting because they shot at and killed other people. Bowman, 162 Wn.2d at 327. Mr. Hernandez agrees that firing a gun at

another person creates a substantial risk of death or serious bodily injury and therefore satisfies this element of drive-by shooting. But the conduct at issue in Perez and Bowman stands in contrast to the conduct here, where Mr. Hernandez's passenger shot away from people and toward empty cars.

The State notes that Sergeant Hopp was unable to determine the trajectory of the bullets, but another State's witness, Detective Abarca, testified as follows:

Q: From where you found the bullets, can you tell whether it was fired from in front of the driveway or in front of the house?

A: Yes. The trajectory showed it was fired from in front of the house, not the driveway.

Q: If it hit a car in the driveway it would have been fired at an angle?

A: Correct.

3 RP 172. On review, we must "admit[] the truth of the State's evidence," Brief of Respondent at 2, including Detective Abarca's testimony that although Mr. Hernandez's car was directly in front of the house, the shots were fired at an angle away from the house and toward the empty cars in the driveway. There was no evidence to the contrary; all of the State's evidence showed Mr. Hernandez's passenger shot at the cars, not at the house or at people. Admitting the truth of the State's evidence, and

applying the plain language of the statute, Mr. Hernandez did not commit drive-by shooting because neither he nor an accomplice created a substantial risk of serious bodily injury or death. This Court should reverse the convictions and remand for dismissal of the charges. The Court need not reach the alternative arguments below.

2. Over Mr. Hernandez’s objections, the court instructed the jury on the definition of “physical injury” instead of “serious physical injury,” thereby lowering the State’s burden of proof and violating Mr. Hernandez’s right to due process.

As explained in Mr. Hernandez’s opening brief, the trial court lowered the State’s burden of proof and violated Mr. Hernandez’s right to due process by providing a jury instruction on mere “physical injury” where the statute requires proof of a substantial risk of “serious physical injury.” Brief of Appellant at 13-17 (citing State v. Kylo, 166 Wn.2d 856, 215 P.3d 177 (2009); State v. Peters, 163 Wn. App. 836, 261 P.3d 199 (2011)).

The State’s response consists mainly of a large block quote of the WPIC, Brief of Respondent at 15-17, but the WPIC does not settle the issue because WPICs are not the law. The legislature defined drive-by shooting as reckless shooting that creates a substantial risk of “serious physical injury,” not just physical injury. RCW 9A.36.045(1). Where a WPIC is in conflict with the statute, the statute must prevail. State v.

Goble, 131 Wn. App. 194, 202-03, 126 P.3d 821 (2005); State v. Freeburg, 105 Wn. App. 492, 506-07, 20 P.3d 984 (2001). And where the instruction is misleading and lowers the State's burden of proof, it violates due process. Goble, 131 Wn. App. at 202-03. It is especially important that the instruction defining the level of harm not be misleading, because the jury will be left with the impression that the evidence of potential harm is sufficient when it is not. See Freeburg, 105 Wn. App. at 506-07 (citing State v. Corn, 95 Wn. App. 41, 54-55, 975 P.2d 520 (1999)) (trial court left impression that defendant did not establish self-defense by giving instruction for wrong level of harm defendant had to face in order to lawfully defend self).

The State also relies on Taitt and Welker, but the issue of whether a jury must be instructed on the definition of "serious bodily injury" was mere dicta in those cases. See State v. Taitt, 93 Wn. App. 783, 791, 970 P.2d 785 (1999); State v. Welker, 37 Wn. App. 628, 637-38, 683 P.2d 1110 (1984). Furthermore, just as the WPICs must yield to the statute and the Due Process Clause, so too must the dicta in Taitt and Welker. These cases have been undermined by more recent decisions making clear that courts violate due process by misstating the level of harm required to prove a crime or a defense. See, e.g., Kyllo, 166 Wn.2d at 864-65; Peters, 163 Wn. App. at 847.

As for the statement that the definition of “serious” is a matter of common sense, it is not at all clear where the line between “serious injury” and “nonserious injury” is drawn, and the jury should be instructed on the difference. If anything, the definition of “physical injury” is a matter of common sense – indeed the WPIC definition is circular, defining “physical injury” as “physical pain or injury”. WPIC 2.03; CP 105. It is the difference between “physical injury” and “serious physical injury” that should be explained. By instructing the jury on the definition of mere “physical injury,” the court misled the jury and implied this was all the State had to prove. Because the statute requires substantial risk of “serious physical injury,” not just “physical injury,” the trial court lowered the State’s burden of proof and violated Mr. Hernandez’s right to due process. The convictions should be reversed and the case remanded for a new trial.

3. The trial court violated Mr. Hernandez’s Fifth and Fourteenth Amendment rights by admitting statements he made to jail personnel in response to questions he was told would be used only for booking purposes.

As explained in the opening brief, the trial court violated Mr. Hernandez’s constitutional rights by admitting statements he made to jail booking officers in answer to their questions about gang affiliation. The trial court’s ruling that the booking officers’ questions did not constitute

an “interrogation” is incorrect. Although some routine booking questions fall outside the scope of the Fifth and Fourteenth Amendments, questions that are reasonably likely to produce an incriminating response do not. Furthermore, Mr. Hernandez’s right to due process was violated by the use of his statements at trial after he was told they would be used only for “housing” purposes. Brief of Appellant at 17-22 (citing State v. Denney, 152 Wn. App. 665, 218 P.3d 633 (2009); Doyle v. Ohio, 426 U.S. 610, 618, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)).

Although Denney otherwise controls, the standard of review cited in that case, and relied upon by the State in its response, is wrong. As the State notes, the Denney court applied a “clearly erroneous” standard to the question of whether booking officers’ questions were reasonably likely to produce an incriminating response and therefore constituted a custodial interrogation. Denney, 152 Wn. App. at 671. But the question of whether an encounter constitutes a custodial interrogation is a legal conclusion this Court reviews de novo.

This Court explained the proper standard in State v. Solomon, 114 Wn. App. 781, 787-89, 60 P.3d 1215 (2002). There, the issue was whether the suspect was in custody for purposes of Miranda. This Court clarified that the question is a mixed question of fact and law. Id. at 787 (citing Thompson v. Keohane, 516 U.S. 99, 112-13, 116 S.Ct. 457, 133

L.Ed.2d 383 (1995)). This Court reviews a trial court's factual findings, i.e. findings regarding what actually occurred, for substantial evidence. Id. at 789. But the Court then reviews the supported and unchallenged findings to determine whether, as a matter of law, the circumstances amounted to a custodial interrogation. Because this is a legal determination it is reviewed de novo. Id. at 789. Where, as here, what occurred factually is undisputed and the only dispute is over whether the facts constitute a custodial interrogation, the question is reviewed de novo. Id. at 788.

Here, the parties agree on the facts. The booking officer testified that she asked Mr. Hernandez if he was involved in any gangs. 4 RP 194. The issue is whether, as a matter of law, this question was reasonably likely to elicit an incriminating response and was therefore a custodial interrogation. The standard of review is de novo. See Solomon, 114 Wn. App. at 787-89.

As explained in the opening brief, the trial court erred as a matter of law in ruling that the question was not an interrogation and in denying the motion to suppress the statements. The State claims "this was a very routine set of questions" and "there was no motive" on the part of the booking officers that the information obtained be used against Mr. Hernandez at trial. Brief of Respondent at 21. But the same was true in

Denney. There, this Court responded to a similar State's argument by explaining, "A legitimate question, asked with good intentions, will still violate a defendant's Miranda rights if it is reasonably likely to produce an incriminating response." Denney, 152 Wn. App. at 673.

The State then claims:

Further, as the trial court stated, the use of this information was for the purpose of an "aggravator" and the concept of that is 'fairly nuanced' clearly indicating that this was once again distinguishable from Denney because in Denney the questions asked were or could have been seen by the law enforcement staff at the jail as having the possibility of some use or bearing on the charges filed.

Brief of Respondent at 21. But on the very next page, the State admits, "The admission of the evidence of gang involvement was not just for the purpose of proof of the aggravator but was one of the main theories of the State's case." Brief of Respondent at 22. Indeed, a reasonable person would expect questions of gang involvement would be reasonably likely to elicit an incriminating response in a drive-by shooting case, even if aggravating factors regarding gangs did not exist. But especially given that people in Washington can be punished more harshly for their crimes if they are gang-related, questions about gang involvement constitute interrogations for purposes of the Fifth and Fourteenth Amendments, and the trial court's conclusion to the contrary should be reversed.

As a final note, Mr. Hernandez did not assign error to the failure to file written findings and conclusions pursuant to CrR 3.5 because when counsel has done so in the past it has only caused delay of the appeal. Mr. Hernandez should not be penalized for the State's failure to file findings by having his appeal delayed while findings are entered. Furthermore, as explained above, Mr. Hernandez does not challenge any factual findings, but only the legal ruling that the question did not amount to an interrogation and the resulting statement was admissible. Accordingly, Mr. Hernandez asks this Court to review the oral ruling as set forth in the transcript, and to reverse for the reasons set forth above and in the opening brief. See State v. Grogan, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008) (reviewing Miranda issue despite absence of required CrR 3.5 written findings and conclusions because oral ruling was sufficient to permit appellate review).

4. The trial court exceeded its authority and deprived Mr. Hernandez of a fair trial when it permitted the jury to hear evidence supporting the alleged aggravating factor and imposed an additional three years of imprisonment based on the aggravating factor.

As explained in the opening brief, the trial court lacked the statutory authority to submit evidence of the aggravating factor supporting an exceptional sentence to the jury because the aggravating factor the

State alleged is not listed in RCW 9.94A.537(4). Brief of Appellant at 22-24.

The State claims this issue may not be raised for the first time on appeal, but the State is wrong. Brief of Respondent at 25-26. An argument that the court lacked statutory authority may be raised for the first time on direct appeal or even in a collateral attack, because a defendant cannot agree to a sentence not authorized by statute. See In re Personal Restraint of Goodwin, 146 Wn.2d 861, 867-76, 50 P.3d 618 (2002) (rejecting State's waiver argument and explaining issue at length).

The State correctly notes that subsection (2) of the statute allows the court to impanel a jury where a new trial is required on aggravating factors. It argues that the legislature must have intended reconstituted juries to hear evidence of the gang aggravator and must have intended the same for trial juries. Brief of Respondent at 24.

But the legislature did not say so. The plain language of RCW 9.94A.537(4) states that evidence supporting the aggravating factors set forth under RCW 9.94A.535(3)(a) through (y) shall be presented to the jury. It does not include factor (aa). The State argues that the principle of "expressio unius est exclusio alterius" does not apply (i.e. that the explicit inclusion of sections (a) through (y) does not mean the legislature meant to exclude other provisions) because it would defeat the intent of the

legislature. Brief of Respondent at 25. But the intent of the legislature is to be determined from the plain language of the statute. Where, as here, the plain language is unambiguous, we do not resort to tools of statutory construction to ascertain legislative intent. State v. Moeurn, 170 Wn.2d 169, 174, 240 P.3d 1158 (2010). Indeed, even if the Legislature “intended something else but failed to express it adequately,” courts must “derive the statute’s meaning from its language alone.” State v. Azpitarte, 140 Wn.2d 138, 142, 995 P.2d 31 (2000). Thus, the State’s arguments on this issue should be rejected.

5. The State presented insufficient evidence to prove Mr. Hernandez committed the crimes to benefit a criminal street gang, requiring reversal of the exceptional sentence.

As explained in the opening brief, the exceptional sentence should be reversed because the State presented insufficient evidence as a matter of law to prove Mr. Hernandez committed the crimes to benefit a criminal street gang. Mr. Hernandez was not a member of any gang but at most “associated” with LVL Sureños. 3 RP 163; 4 RP 235, 249; 5 RP 327, 408. He did not know Manuel Campos, whose car had been vandalized the day before - possibly by a rival gang member. 5 RP 336-40, 389, 426. Manuel Campos himself pled guilty only to drive-by shooting, stating in his plea form that he committed the crime in retaliation for someone having

vandalized his car, not for any gang-related reason. 5 RP 384. But even if the jury believed either Manual Campos or Angel Mendez committed the crime to benefit the LVLs instead of to avenge their own loss, this would be insufficient to prove Mr. Hernandez intended to benefit a gang. Brief of Appellant at 24-28 (citing State v. Bluehorse, 159 Wn. App. 410, 248 P.3d 537 (2011)).

The State notes, as already acknowledged by Mr. Hernandez, that Bluehorse dealt with the gang aggravator under subsection (s) and not the (aa) aggravator. Brief of Respondent at 28. But the State agrees that because there appear to be no cases addressing the quantum of evidence necessary to support a finding on the (aa) aggravator, it is appropriate to look at cases construing subsection (s) for guidance. Brief of Respondent at 29-30. The State specifically agrees that a comparison to Bluehorse is appropriate. Brief of Respondent at 30. Again, in that case, this Court reversed the exceptional sentence for insufficient evidence of the aggravating factor even though (1) the defendant was identified as the shooter, (2) his vehicle was recognized as one associated with a particular gang, (3) before shooting he or someone in his car yelled a phrase associated with a particular gang, (4) he had been seen earlier that year repeatedly wearing clothing associated with a particular gang and making gang signs, and (5) a gang expert testified that gang members maintain

their status by retaliating when rival gang members assault fellow gang members or encroach on their own gang's territory. Bluehorse, 159 Wn. App. at 416-418, 423. If the evidence was insufficient in Bluehorse, it was certainly insufficient here.

Furthermore, the State again references the wrong standard of review. The standard is not abuse of discretion. Brief of Respondent at 28. Rather, in reviewing a challenge to the sufficiency of the evidence, the same standard applies whether reviewing an element of the crime or an aggravating factor. State v. Stubbs, 170 Wn.2d 117, 123, 240 P.3d 143 (2010). That is, evidence is sufficient to support a jury's finding of an aggravating factor only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the [aggravator] beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). An appellate court reviews de novo the legal justification for an exceptional sentence. Stubbs, 170 Wn.2d at 124.

Reviewing the question under this standard, the State presented insufficient evidence to prove the aggravating factor, and the exceptional sentence should be reversed. Brief of Appellant at 24-28.

- 6. The prosecutor dismissed the allegation under RCW 9.94A.535 (3)(s), but the judgment states Mr. Hernandez was “found guilty” of this aggravating factor. The judgment must be corrected.**

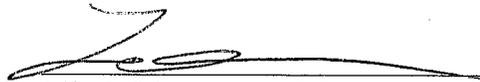
The judgment and sentence incorrectly states that Mr. Hernandez was “found guilty by a jury verdict” of the aggravating factor under RCW 9.94A.535 (3)(s) for each count. CP 121. The State agrees that this finding must be deleted because the allegation of this aggravating factor was dismissed. Brief of Respondent at 31

B. CONCLUSION

For the reasons set forth above and in the opening brief, Mr. Hernandez asks this Court to reverse.

DATED this 14th day of December, 2012.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
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v.)	NO. 30555-4-III
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ELY GARCIA,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF DECEMBER, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF DECEMBER, 2012.

X _____ 